IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 9TH MARCH 2007 / 18TH PHALGUNA 1928

WA.No. 2321 of 2006()

AGAINST THE JUDGEMENT IN OP.36057/2002 Dated 11/10/2006
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APPELLANT: 6TH RESPONDENT

RAMESHAN PADINJARE PARAMBATH,
HIGH SCHOOL ASSISTANT (MATHS),
V.P.ORIENTAL HIGH SCHOOL, CHOKLI,
P.O.CHOKLI, KANNUR DISTRICT.

BY ADV. SRI.P.K.SURESH KUMAR
SRI.R.K.MURALEEDHARAN

RESPONDENTS: PETITIONERS & RESPONDENTS 1 TO 5
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1. M.C.JAYAVALLY, W/O. CHANDRAN,
HIGH SCHOOL ASSISTANT (MATHS),
V.P.ORIENTAL HIGH SCHOOL, CHOKLI, CHOKLI P.O.,
KANNUR DISTRICT.

2. P.PRASANNA,
UPPER PRIMARY SCHOOL ASSISTANT,
-DO- -DO-

3. THE STATE OF KERALA, REPRESENTED BY
THE PRINCIPAL SECRETARY TO GOVT.,
GENERAL EDUCATION DEPARTMENT,
SECRETARIAT, TRIVANDRUM.

4. THE DIRECTOR OF PUBLIC INSTRUCTION,
JAGATHY, TRIVANDRUM-14.

5. THE DEPUTY DIRECTOR OF EDUCATION,
KANNUR.

6. THE DISTRICT EDUCATIONAL OFFICER,
THALASSERY, KANNUR DISTRICT.

7. THE MANAGER,
V.P. ORIENTAL HIGH SCHOOL, CHOKLI,
P.O.CHOKLI, KANNUR DISTRICT.

BY GOVERNMENT PLEADER SRI.BENNY GERVASIS

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 01/03/2007, THE COURT ON 09/03/2007 DELIVERED THE FOLLOWING:

P.R. Raman & Antony Dominic, JJ.
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W.A.No.2321 of 2006
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Dated this the 9th day of March, 2007.

JUDGMENT

Antony Dominic,J.

This appeal is filed by the sixth respondent in the Writ Petition. By the impugned judgment, the learned single Judge had quashed Exts.P5,P6 and P7 on the ground that the power of revision available to the Government under Rule 93 of Chapter XIV A of Kerala Education Rules (hereinafter referred to as "K.E.R.") was only in respect of original orders. It is aggrieved by the said judgment that the appellant has come up in appeal. For the sake of convenience, the parties are described as they are arrayed in the Original Petition.

2. Before we deal with the controversy, requiring to be resolved, we may notice the facts which are necessary for the disposal of the appeal.

3. The sixth respondent in the Writ Petition was appointed in a leave vacancy of HS.A. (Maths) for the period from 6.10.1997 to

11.12.1997 in the V.P. Oriental High School, Chokli of which the fifth respondent is the Manager. The appointment was also approved by the Educational Authorities. Being a claimant under Rule 51A of Chapter XIV A of K.E.R., he was appointed in a permanent vacancy of H.S.A.(Maths) with effect from 1.6.1998, in a retirement vacancy that arose on 31.3.1998. In Ext.P8 dated dated 10.8.1998, the staff fixation order for 1998-99, there was reduction of one H.S.A. (Core subject) and the Teacher, who was working against the post was ordered to be absorbed against the retirement vacancy of H.S.A. (Maths), to which the sixth respondent was appointed. Consequently, when the fifth respondent – Manager sought approval of the appointment of the sixth respondent that was declined by the fourth respondent – District Educational Officer, for want of sanctioned post, as per Ext.P9 dated 11.9.1998. The Manager filed appeal before the Deputy Director of Education, the third respondent, which was rejected by Ext.P10. From Ext.P10, it is evident that for the period 1997-98 the number of sanctioned post of H.S.A. (Maths) was four and three Teachers were working, while for H.S.A. (S.S.) against four sanctioned post, four Teachers were working. In 1998-99, when the sanctioned post of H.S.A. (Maths) continued to be four, the number of Teachers working was reduced to two while as against H.S.A. (S.S.), though the

sanctioned post was reduced to three, four teachers were working against three posts, which was obviously due to the absorption of one H.S.A. (S.S.), who was rendered surplus against the retirement vacancy of H.S.A.(Maths). Further, Ext.P10 also discloses the following:

> "Due to reduction of strength one post of HSA (Core subject) ie. H.S.A. (SS) was reduced during 98-99 – one teacher namely Sri. CC.Ramakrishnan HSA (Maths) retired on the AN of 31.3.98 and hence there is no retrenchment during 98-99. But there is a deficiency of 2 H.S.A. (Maths) as per revised subject ratio 1:1:1 as ordered in circular No.H2-54419/94 dt. 10.2.95 of the Director of Public Instruction, Trivandrum. But the Government order has clearly clarified that no fresh appointments can be made for the sole purpose of introducing 1:1:1 ratio. Hence, the action of the Manager in having filled up the retirement vacancy of H.S.A. (Maths) during 98-99 is highly irregular as there is no sanctioned post to accommodate the teacher."

4. The manager pursued the matter by filing revision which was rejected by Ext.P11 order of the second respondent and a representation that is stated to have been filed by the sixth respondent was also rejected by Ext.P12 order issued by the first respondent –

Government. It would appear that the sixth respondent still persisted in getting his appointment approved and continued to represent the matter to the first respondent. Ultimately, his attempts yielded result, when the first respondent issued Ext.P5 directing the approval of the appointment of the sixth respondent in the retirement vacancy of H.S.A. (Maths) with effect from 1.6.1998, limiting the post of H.S.A. (Core subject) to 11. it was also ordered that the excess H.S.A. (S.S.) will either be retained by applying 1:40 ratio or given protection. It is seen from Ext.P5 that the first respondent had made reference to the sanctioned strength and the number of Teachers working as per the staff fixation orders for the years 1997-98 and 1998-99 and thereafter justified its conclusion on the following reason:

> "From the above it can be seen that there was deficiency in Maths and excess in SS. Excess in SS was due to the reduction of division. The excess HSA (SS) was adjusted in the vacancy of Maths and hence the appointment of the petitioner was turned down. But it was against the subject ratio 1:1:1 as ordered in Govt. order No.37/94/Edn. dated 16.3.94 and in circular No.H2-54419/94 dated 10.2.95 of the Director of Public Instruction. But in the above circular it is also specified that retrenchment cannot be allowed just for satisfying the subject ratio 1:1:1."

Consequently, the fourth respondent – District Educational Officer

issued Ext.P6 revised staff fixation order and still later the District Educational Officer approved his appointment by Ext.P7 order dated 1.6.1998.

5. It was at that stage that the petitioners, having felt aggrieved, filed this Original Petition. So far as the first petitioner is concerned, he was appointed by the fourth respondent as U.P.S.A. with effect from 10.6.1996, which was approved by the fourth respondent. According to him, while working as U.P.S.A. he became qualified to be appointed as H.S.A. (Maths). He was thereafter promoted as H.S.A. (Maths) against a retirement vacancy, effective from 6.6.2001, in terms of the provisions contained in Rule 43 of Chapter XIV A of K.E.R. However, for want of sanctioned post and on account of pendency of a dispute regarding the transfer of management, the fourth respondent rejected approval, which was confirmed by the third respondent also. It is stated that the matter is pending in revision with the second respondent. As far as the second petitioner is concerned, his fortunes will depend upon the fortunes of the first petitioner in as much as he was appointed as U.P.S.A. against the post vacated by the first petitioner on his promotion as H.S.A. (Maths). In his case also, the approval was rejected and it was confirmed in appeal. It is stated that the matter is pending in revision

under Rule 8 of Chapter XIV A of K.E.R. It was in the aforesaid factual background that the Original Petition came to be filed by the petitioners herein seeking the following prayers:

> "(a) call for the records relating to Exhibits P5,P6 and P7 and quash the originals of the same by the issue of a writ of certiorari or other appropriate writ or order.
>
> (b) issue a writ of mandamus or other appropriate writ, order or direction commanding the 4th respondent to approve the appointment of the 1st petitioner as H.S.A. (Maths) from 6.6.2001 and the 2nd petitioner as U.P.S.A. from 7.6.2001 onwards.
>
> (c) direct the 2nd respondent to effectively consider and pass appropriate orders upon Exhibits P2 and P4 after affording an opportunity of being heard to the petitioners within a time limit without following Exhibits P5 to P7 orders."

6. Counter affidavits have been filed by respondents 1, 5 and 6. The sixth respondent has also filed an additional counter affidavit. According to the sixth respondent, this Original Petition has to be rejected as the petitioners do not have locus standi to challenge Exts.P5 and P7 orders. It is stated that the first petitioner was a Chemistry graduate with B.Ed. at the time of entry into service and she acquired the degree in Maths only after 1.6.1998. It is thus pleaded that on the date of occurrence of the vancancy to which the

the sixth respondent was appointed, the first petitioner was unqualified and hence, she could not have staked a claim to that post. Counsel for the sixth respondent relied on the judgment of this Court in the case of **Padmakumar** v. **D.P.I.** - ILR 2001(2) Kerala Case No.9 to contend that when a vacancy arises in a Core subject, it has to be filled up by a Teacher in that subject. According to him, it was to adjust H.S.A. (S.S.), who was rendered surplus consequent on the revised staff fixation that his approval was rejected. This reason, he would contend, is unsustainable in the light of the law laid down by this Court. He would also submit that in terms of circular No.H2-544419/94 dated 10.2.1995 of the Director of Public Instructions, subject ratio of 1:1:1 has to be maintained in Core subjects and by issuing Ext.P5, the compliance with the circular has been achieved. It is stated that by adjustment of H.S.A. (S.S.) against H.S.A. (Maths) and by declining approval of his appointment, subject ratio was given a go bye and that Ext.P5 order has been issued by the Government whereby the wrong has been rectified. He would plead for the position that at any rate by Ext.P5, the first respondent was only remedying a mistake and justice has been done to him, which ought not to be upset by this Court exercising the jurisdiction under Article 226 of the Constitution of India.

7. The fifth respondent – Manager also in his counter affidavit refers to Ext.P5 as an order issued by the first respondent, on a representation made by the sixth respondent when the Manager failed in obtaining approval at the original appellate and revisional stages. He would also state in paragraph 7 of his counter affidavit that in the staff fixation order for the year 2001-2002 one post of H.S.A. was sanctioned and the first respondent, being the senior-most qualified U.P.S.A. and a Rule 43 of Chapter XIV A claimant, was promoted against the vacancy, although the approval has been rejected by the District Educational Authorities. The first respondent in its counter affidavit also seeks to justify Ext.P5 order granting approval to the appointment of the sixth respondent.

8. After hearing the parties, a learned single Judge of this Court disposed of this Original Petition by judgment dated 11.10.2006 quashing Exts.P5 and P7 on the ground that Rule 93 of Chapter XIV A of K.E.R. conferred power on the Government to review original orders, on an application made by the parties. According to the learned single Judge, the approval being declined, appeal and revision filed were rejected by the statutory authorities. In view of that matter, the learned single Judge held that the order that was reviewed by Ext.P5 was not an original order and hence, the Government acted

without jurisdiction.

9. We heard the counsel for the appellant and respondents in the appeal. In the light of the controversy that is required to be resolved, two issues arise for our consideration; (1) Whether the Government could have issued Ext.P5, exercising its power of revision under Rule 93 of Chapter XIV A of K.E.R. (2) Whether, even if Ext.P5 passed by the first respondent is without jurisdiction, this Court will be justified in quashing the same resulting in perpetuation an illegality and denial of justice.

10. As far as the competence of the first respondent in exercising its power under Rule 93 of Chapter XIV A of K.E.R. is concerned, the plain words of Rule 93 make it clear that the Government shall on an application of the parties, review the original orders. It is also provided that there shall be only one review and an application for review shall be made within a period of two months from the date of the order. The facts which we have narrated in detail, would show that when the Manager sought approval of appointment of the sixth respondent, that was declined by the fourth respondent by Ext.P9. Appeal filed by the Manager was rejected by the third respondent by Ext.P10. Still later, a revision was filed by the Manager, which was also rejected by the second respondent as per

Ext.P11. Thereafter, as stated by the first respondent in its counter affidavit, the first respondent made a representation to the Chief Minister's Public Grievance Redressal Cell, Trivandrum and the same was also rejected by Ext.P12. The counter of the first respondent also discloses that the sixth respondent again submitted a revised petition dated 20.1.2001 to the first respondent requesting to review Ext.P12 decision and to approve his appointment with effect from 1.6.1998 and that the concerned authorities, namely, the Manager, the sixth respondent and the District Educational Office were heard and the Government issued Ext.P5 ordering to approve his appointment with effect from 1.6.1998.

11. By no stretch of imagination, can it be said that the order Ext.P13 dated 7.11.2000 sought to be reviewed by the Government as per the representation of the sixth respondent, is an original order in terms of Rule 93 of Chapter XIV A of K.E.R. If it is not an original order, the Government did not have the power under Rule 93 of Chapter XIV A of K.E.R. and on that reason itself, Ext.P5 cannot be sustained. We are in agreement with the learned single Judge in this respect.

12. However, our conclusion on the above issue does not conclude the dispute, if we accept the contention of the appellant on

point No.2. As we have already noted, according to the appellant, quashing of Ext.P5 and Ext.P7 would result in restoration of the orders of the Educational Authorities declining approval to his appointment which is perse illegal for other reasons and therefore we should restrain ourselves from exercising power under Article 226 of the Constitution of India. Counsel made reference to various authorities in support of the above proposition canvassed by him. He has referred to the judgment of the Supreme Court reported in **Venkateswara Rao** v. **Government of Andhra Pradesh** – A.I.R. 1966 S.C. 828, wherein it has been observed as follows:

> "If the High Court had quashed the said order, it would have restored an illegal order – it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances".

This was followed by the Andhra Pradesh High Court in the case reported in **M.Padmanabha Iyyengar** v. **Government of A.P**. - A.I.R. 1990 A.P. 357 and held as follows:

> "It must also be remembered that the remedy under Art. 226 is a discretionary one. The court is not bound to interfere merely on the establishment of an irregularity or

> illegality. The court must further be satisfied that such interference is called for to meet, or to further, the orders of justice. If by interfering in the matter the interests of justice are going to suffer, this Court will withhold its arm: (see ***Sangram Singh*** v. ***Election Tribunal, Kotah – AIR 1955 SC 425*** and ***Venkateseara Rao*** v. ***Government of Andhra Pradesh*** – AIR 1966 SC 828. Having regard to the totality of the circumstances, we do not think that this court should interfere and quash the inquiry under S.5A."

Still later in the case of **Jagan Singh** v. **State Transport Appellate Tribunal** – A.I.R. 1980 Raj. 1, it has been held as follows:

> "As we have already pointed out above, the effect of setting aside the impugned order passed by the Tribunal by a writ of certiorari would be restoring an invalid and illegal order passed by the Regional Transport Authority. Reference may also be made to **G.Venkateswara Rao** v. **Government of Andhra Pradesh** (AIR 1966 SC 828)."

Making reference to **R** v. **Garland** – (1970) 5 QB 269, it was contended that even in issuing writs of mandamus, the same principle is followed and that if the effect of issuing mandamus is going to be highly prejudicial, as where it would enable trustees to evade the discharge of their duties, a court of equity will not issue the writ. These judgments were followed by a Division Bench of this Court in

the case reported in **Koya** v. **State of Kerala** – 1992 (2) K.L.T. 194, where it has been held as follows:

> "It is now well settled that if an order of an authority is illegal or without jurisdiction, it need not be quashed by the High Court under Art. 226 of the Constitution of India if such action would result in restoration or revival of another order, which is also bad."

On this reasoning, this Court concluded in the following terms:

> "Following the principles laid down by the Supreme Court in ***Venkateswara Rao*** v. ***Government of Andhra Pradesh*** (AIR 1966 SC 828) for exercise of discretion, we hold that this is not a fit case for quashing Ext.P5 order of the Government even if it was without jurisdiction for, such quashing would restore Ext.P4 order of the Wakf Board which is bad for other reasons. This is therefore, not a fit case for exercising discretion to quash Ext.P5."

Counsel also made reference to the judgment in **Mohammad Swallleh and Others** v. **Third Addl. District Judge, Meerut and Another** – (1988)1 S.C.C. 40. Paragraph 7 thereof is extracted below for reference:

> "It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the

appeal laid (sic no appeal lay) before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Article 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore in the facts and circumstances of the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Article 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken."

We were also referred to the Supreme Court judgment in the case reported in **Roshan Deen** v. **Preeti Lal** – A.I.R. 2002 S.C. 33, where it has been held as follows:

> "Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it. (vide ***State of Uttar Pradesh*** v. ***District Judge, Unnao and others***, AIR 1984 SC 1401). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

We were also referred to a Division Bench of this Court in W.A.No.2430 of 2002 in which the aforesaid judgment of the Supreme Court has been followed and it was held that the court cannot erase justice done in the name of correcting error of law.

13. Bearing in mind, the law as laid down by this Court, other High Courts and the Apex Court we should now proceed to examine whether in the facts of this case, we will be justified in interfering with Ext.P5. Counsel for the petitioners in the Original Petition was relying on circular No.H2-544419/94 dated 10.2.1995 issued by the Director of Public Instructions. This circular was issued in order to maintain

academic excellence and to ensure that the Teachers in the concerned subject alone shall engage classes. It was also ordered that in order to effectively implement the guidelines provided in the circular and to maintain the academic excellence that the guidelines were revised which were to be strictly complied with. In terms of this circular, the posts of H.S.A. in Core subject are to be divided in the ratio of 1:1:1. It was also directed that for the implementation of the circular alone, no Teacher having approved service shall be retrenched and fresh appointments made. It was also ordered that the revised guidelines shall be strictly implemented from the date of this circular. Thus, from 10.2.1995 post of H.S.A. in Core subject should be divided in the ratio of 1:1:1. From Ext.P8 staff fixation order, we notice that in 1997-98 and 1998-99 the sanctioned strength of H.S.A. in Core subject was 12 and 11 respectively and the reduction in the subsequent year was due to division fall. Ext.P5 discloses that in 1997-1998 while the sanctioned strength of H.S.A. (Maths) was four only three Teachers were working, while in H.S.A. (S.S.) the sanctioned strength was four and there were four Teachers. When it came to 1998-99, though the sanctioned strength of H.S.A. (Maths) continued to be four, the strength of Teachers was reduced to two. However, in respect of H.S.A. (S.S.) though there was reduction in the sanctioned strength to

three, the number of Teachers working was increased to four, for the obvious reason that the excess Teacher, who was rendered surplus was adjusted against the retirement vacancy of H.S.A. (Maths). In Ext.P5, as we have already extracted hereinabove, the Government on examination of the situation that prevailed in the School during the relevant period found that this was against the subject ratio of 1:1:1 implemented by the Government and directed to be strictly complied with as per their circular dated 10.2.1995. The factual situation that was prevalent in the School at the relevant time is not disputed by the counsel for the petitioners in the Original Petition, Government Pleader or the counsel for the Manager. If that be the admitted position, the Manager could not have been faulted for appointing the sixth respondent with effect from 1.6.1998 in the retirement vacancy which arose on 31.3.1998. If that be so, the Educational Authorities had no justification in declining the approval of the appointment of the sixth respondent.

14. Ext.P6 is the revised staff fixation order issued consequent on Ext.P5. From Ext.P6, it is seen that for the post of H.S.A. (Maths) in 1999-2000 there were four sanctioned post while in 2000-2001 and 2001-2002 there were only three posts. Even though that is the factual position, it is also not under dispute by any one of the parties.

If that be so, on the retirement of N.Ramachandran on 31.3.2001, there could not have been a vacancy available for promoting and posting the first petitioner in the Original Petition as H.S.A. (Maths).

15. Thus, we find that ultimately by Ext.P5, the Government have corrected a manifest mistake and injustice that was done to the sixth respondent has been undone. While issuing Ext.P5, the Government have also ordered retention of the sixth respondent applying the ratio of 1:40 or to provide protection to him and thus at any rate adequate safeguards have been provided for protecting his interests. If we set aside Ext.P5 and grant the prayers, the sixth respondent will be thrown out of employment and we will be only perpetuating an injustice done, which we are not prepared to do. We must also mention that, taking into account the complaint of the counsel for the petitioners that they were not heard before Ext.P5 was issued, we allowed the counsel to argue his case on merits fully and by this, that grievance is also redressed. In our view, the learned single Judge has not applied the law as laid down by the Supreme Court and the other High Courts, including this Court correctly in the facts of this case and therefore, we cannot agree with the conclusions arrived at by the learned single Judge, although on the sustainability of Ext.P5, we agree with the learned single Judge.

16. For the aforesaid reasons, we allow this Writ Appeal, set aside the judgment of the learned single Judge and dismiss the Original Petition, without any order as to costs.

P.R. Raman,
Judge.

Antony Dominic,
Judge.

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